Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 86-4)

Revocation of Lowell L. Glenn (All-Glenn's, Inc.) as a Customs Approved Public Gauger

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Lowell L. Glenn (All-Glenn's, Inc.) of 9952 Spinnaker Drive, Huntington Beach, California 92646, was approved to gauge imported petroleum and petroluem products in all Customs districts on May 9, 1979. Notice of approval was published as T.D. 79-140. One of the conditions which each public gauger must comply with in order to be approved and to keep approval in force is to notify Customs, in writing, within 60 days of any change in name, address, ownership, or financial condition. After exhausting all feasible means to establish contact with Mr. Glenn, Customs has been unable to locate him or even to determine if he is still in business.

Accordingly, the approval of Lowell L. Glenn (All-Glenn's, Inc.) to gauge imported petroleum and petroleum products in all Customs Districts is revoked.

EFFECTIVE DATE: December 31, 1985.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

DATED: December 31, 1985.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-5)

Recordation of Trade Name: "UNITEK CORPORATION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On June 6, 1985, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "UNITEK CORPORATION" was published in the Federal Register (50 FR 23866). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in opposition to the recordation and received not later than August 5, 1985.

Unipacific Corporation, a California corporation, commented in opposition to recordation of the trade name, citing concern that "UNITEK CORPORATION" is confusingly similar to Unipacific Corporation's "UNITECH" trademark registered on the Principal Register of the U.S. Patent and Trademark Office (Reg. No. 1,222,480), used for consumer electronic equipment, namely, portable stereo radios, mini-portable cassette players, FM Converter cassette modules, stereo headphones and televisions.

We find that the two trademarks lawfully co-exist. Therefore, genuine articles bearing the "UNITECH" trademark shall not be seized or detained as confusingly similar to "UNITEK CORPORATION."

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "UNITEK CORPORATION" is recorded as the trade name used by Unitek Corporation, a corporation organized under the laws of the State of California, located at 2724 South Peck Road, Monrovia, California 91016. The trade name is used in connection with the developing and marketing of products manufactured in the United States for orthodontists, endodontists and other dental specialists, as well as for general dentists and dental laboratories.

DATE: January 9, 1986.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

DATED: January 2, 1986.

EDWARD T. ROSSE,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, January 9, 1986 (51 FR 1057)]

(T.D. 86-6)

Approval of Halcyon Transport Corporation to Gauge Imported Petroleum and Petroleum Products in Additional Customs Districts

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval to gauge in additional districts.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Halcyon Transport Corporation was approved to gauge imported petroleum and petroleum products in the Houston District on February 10, 1984, under T.D. 84-44. Recently, Halcyon Transport Corporation notified Customs that its area of operations had expanded, and requested that its approval be modified to include cities within the Customs Districts of Port Arthur, Texas, and New Orleans, Louisiana. Since Halcyon Transport Corporation has complied with all requirements, Customs is granting this request.

Accordingly, Halcyon Transport Corporation is approved to gauge imported petroleum and petroleum products in the Customs Districts of Houston, Texas, Port Arthur, Texas, and New Orleans, Louisiana.

EFFECTIVE DATE: January 6, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229. (202-566-2446).

DATED: January 6, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

(T.D. 86-7)

This notice limits the decision in Appeal No. 85-670, decided June 14, 1985, holding that certain sewing machine needles may be entered free of duty under the Generalized System of Preferences.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., December 20, 1985.

In *The Torrington Co.* v. *United States,* —— CAFC ——, No. 85-670 (Fed. Cir. June 14, 1985), the Court of Appeals for the Federal Circuit affirmed a Court of International Trade decision holding that certain industrial sewing machine needles made in Portugal

are entitled to duty-free entry under the Generalized System of Preferences. The court held that the raw material imported into Portugal, wire, was substantially transformed into new and different articles of commerce, swaged needle blanks, and that the swaged needle blanks were then substantially transformed into other new and different articles of commerce, sewing machine needles. As a result, the value of the swaged needle blanks was includable in the value of the materials produced in the beneficiary developing country (Portugal) for purposes of section 503(b)(2) of the Trade Act of 1974, 19 U.S.C. 2463(b)(2). Since the sum of the value of the materials produced in Portugal plus the direct costs of processing operations performed in Portugal therefore amounted to more than 35 percent of the appraised value of the imported sewing machine needles, duty-free treatment was applied.

The United States Customs Service disagrees with the court's determination that the process whereby sewing machine needles were produced from the swaged needle blanks constituted a substantial transformation into new and different articles of commerce. The parties to the case stipulated that in the form of swaged needle blanks, the articles were already dedicated for use solely as sewing machine needles with a predetermined blade diameter, and that in the majority of cases, a particular type of swaged needle blank became only a single particular type of needle. Slip op. at 16. Thus, the articles already possessed their inherent character and use as swaged needle blanks; they did not acquire those qualities as a result of the simple refinement made to them once they were in blank form. Therefore, no substantial transformation occurred, so the value of the swaged needle blanks should not have been includable in the value of the materials produced in Portugal for purposes of meeting the 35 percent value-content requirement of the Generalized System of Preferences.

Accordingly, the *Torrington* decision shall be applied only in those instances in which the factual situation conforms to the one on which the decision is based.

JOHN P. SIMPSON,
for Commissioner of Customs.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2473)

UNION MANUFACTURING CO., INC., APPELLANT-RESPONDENT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE-PETITIONER

Paul T. Meiklejohn and *John M. Calimafde*, Hopgood, Calimafde, Kabil, Blaustein & Judlowe, of New York, New York, represented appellant.

William E. Perry, Lyn Schlitt and *Michael P. Mabile*, Office of the General Counsel, United States International Trade Commission, of Washington, D.C., represented appellees.

Appealed from: United States International Trade Commission.

(Appeal No. 85-2473)

UNION MANUFACTURING CO., INC., APPELLANT-RESPONDENT, *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE-PETITIONER, on motion to dismiss

Before MARKEY, *Chief Judge*, NEWMAN and BISSELL, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

ORDER

The motion of the United States International Trade Commission (ITC) to dismiss this appeal for lack of jurisdiction is denied.

BACKGROUND

Union Manufacturing Co. (Union) asserts that it has for five years been seeking relief from the importation from Korea of confusingly similar and often-defective copies of its vacuum bottles. On October 15, 1981 the ITC, pursuant to 19 U.S.C. § 1337, instituted an investigation based on a complaint filed by Union. Twelve Korean firms, including Han Baek Trading Co., Ltd. (Han Baek), were named as respondents to the investigation. Investigation No. 37-TA-108, *Certain Vacuum Bottles and Components Thereof*, 45 Fed. Reg. 53,543 (1981).

On August 3, 1982 the Commission's administrative law judge (ALJ) issued a recommended determination that the named respondents had violated section 337 of the Tariff Act of 1930. This determination was based on findings of common law trademark infringement and false designation of origin in connection with the importation into and sale within the United States of the vacuum bottles, the effect or tendency of which was to destroy or substantially injure an efficiently and economically operated United States industry.

The ITC rejected the ALJ's recommended determination in a Notice of Termination published on October 29, 1982, *In re Certain Vacuum Bottles and Components Thereof,* 219 USPQ 637 (U.S. Int'l Trade Comm'n 1982), on the basis that Union had not proven by survey evidence that its vacuum bottle design had acquired a secondary meaning. Union filed a Petition for Reconsideration on November 11, 1982, and a Motion for Relief from the ITC's Order on March 23, 1983, both of which were denied by the Commission on May 24, 1983.

Based on new evidence of consumer confusion showing, *inter alia,* that more than eighty additional imported vacuum bottles were mistakenly returned to Union because they were defective, Union subsequently requested a new investigation. The ITC denied Union's request on February 9, 1984, stating that "eighty returned vacuum bottles is at most evidence that 80 people associate the design of the vacuum bottle with Union", and not sufficient proof of secondary meaning.

On learning of the first ITC action, Union filed suit in October 1982 against Han Baek in the Southern District of New York, alleging false designation of origin and trademark infringement pursuant to section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). On June 7, 1984, a jury found for Union on the false designation of origin claim and for Han Baek on the trademark infringement claim. *Union Mfg. Co., Inc.* v. *Han Baek Trading Co.,* 224 USPQ 228 (S.D.N.Y. 1984). On July 10, 1984 the district court entered judgment enjoining Han Baek from importing the offending vacuum bottles into the United States and further ordered Han Baek to recall all infringing bottles sold during the preceding year. (Union advises that Han Baek did not comply with this order or with an order of contempt.)

Han Baek appealed to the U.S. Court of Appeals for the Second Circuit. On April 4, 1985 the Second Circuit vacated the district court's judgment on the false designation of origin claim, on the ground that the jury had been improperly instructed. *Union Mfg. Co., Inc.* v. *Han Baek Trading Co., Ltd.,* 763 F.2d 42 (corrected opinion), 226 USPQ 12 (uncorrected opinion) (2d Cir. 1985).

The Second Circuit also held that ITC decisions in trademark and unfair competition cases are to be accorded *res judicata* effect, although that effect would be applied only prospectively to Union.

Id. at 44-46, 226 USPQ at 13-15. The Second Circuit observed that Union had not appealed the adverse ITC decisions at the time they were made, and suggested that Union appeal the ITC decisions to this court, stating in its corrected opinion that:

> [S]ince at the time of that [ITC] judgment there was no statutory time limit on appeals from ITC determinations, *SSIH Equipment S.A.* v. *United States International Trade Commission*, 673 F.2d 1387, 1390-91 (C.C.P.A. 1982), Union might still be able to obtain review in the Federal Circuit unless that Court concludes either that a recently enacted statute of limitations applies to bar an appeal at this time, or that an appeal is barred by laches * * *. Under these circumstances, we will direct the District Court to stay further proceedings for thirty days to afford Union an oportunity to pursue an appeal of the ITC decision to the Federal Circuit, and, if an appeal is promptly sought, until the appeal is decided. If Union fails to seek review in the Federal Circuit within thirty days or if the Federal Circuit adjudicates the appeal on its merits, the District Court shall dismiss the complaint. If, on the other hand, the appeal, though taken within thirty days of this decision, is not adjudicated on its merits, then the District Court shall vacate the stay and retry the case.

Id. at 46 (footnote omitted).

Union duly filed the suggested appeal in this court within thirty days of the Second Circuit decision. The ITC now moves to dismiss the appeal as untimely, relying on 19 U.S.C. § 1337(c) 1984)[1] which provides in relevant part:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with chapter 7 of Title 5.

The ITC contends that the Commission determination was final on either October 29, 1982 or May 24, 1983, and that Union is barred by the sixty day statutory time limit.

Union argues in opposition to the motion that this statutory time limit was not enacted until 1984 and does not have retroactive effect. Union asserts that it should not be deprived of its appellate rights when the statute itself is silent on the point, and that the interest of justice requires that doubt be resolved in favor of permitting it to appeal. Union argues that its appeal is in accordance with the decision of the Second Circuit, that it had no reason to appeal earlier, and that acceptance of the appeal would implement the request of the Second Circuit and facilitate resolution of this long-standing matter.

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[1] Technical Amendments to the Federal Courts Improvement Act of 1982, Pub. L. No. 98-620, § 413, 98 Stat. 3335, 3362 (1984).

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ANALYSIS

I

By the Customs Court Act of 1980 Congress deleted the sixty day time limit for appeals from final determinations of the ITC.[2] In *SSIH Equipment S.A.* v. *U.S. Int'l Trade Comm'n,* 673 F.2d 1387, 1391, 213 USPQ 529, 532 (CCPA 1982), the Court of Customs and Patent Appeals held that the statute must be applied in accordance with its terms, and therefore that "there is no fixed time limit on appeals from final determinations of the Commission".

Thus no statutory time limit for appeals was in effect at the time of the ITC's denial of Union's requests for relief. The sixty day limit was added to 19 U.S.C. § 1337(c) by amendment enacted on November 11, 1984. At that date Union had received a favorable jury verdict in the district court, and Han Baek's appeal to the Second Circuit was pending.

The statute is silent on the intended effect of the amendment on unappealed ITC decisions issued prior to November 11, 1984, and it is silent as to its effective date. The legislative history sheds no light on this question, although it plainly states Congress' desire to reinsert "the original 60 day time-period for taking an appeal from a determination of the International Trade Commission". H.R. Rep. No. 98-619, 98th Cong., 2d Sess. 1, 4, *reprinted in* 1984 U.S. Code Cong. & Ad. News 5708, 5796.

The ITC argues that Union's right to appeal the ITC's determinations was extinguished no later than sixty days after November 11, 1984. It argues that under the principle of *Sohn* v. *Waterson,* 84 U.S. (17 Wall.) 596, 600 (1873), the limitation for previously accrued actions runs from the effective date of the later-enacted statute. Although the statute here is silent as to its effective date, the ITC argues that it is the date of enactment.

The *Sohn* rule has often been followed, as a modification of the general rule that statutes that imposed limits where none had existed should be construed only prospectively, unless the statutory language is specifically to the contrary or if there is a necessary implication to contrary effect. *Harvey* v. *Tyler,* 69 U.S. (2 Wall.) 328, 347 (1864).

Subsequent decisions of the Supreme Court have made clear that neither rule need be mechanically applied. The Court has frequently affirmed the power of the legislature to pass statutes of limitations for periods less than those prescribed at the time a cause of action arose, *see, e.g., Koshkonong* v. *Burton,* 104 U.S. 668, 675 (1881), but the Court has consistently emphasized that any shortened time period must be

> subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by

[2] Customs Court Act of 1980, Pub. L. No. 96-417, § 604, 94 Stat. 1727, 1744 (1980).

> the new law for the commencement of an action before the bar takes effect.

In *In re Brown,* 135 U.S. 701, 707 (1890), the Court elaborated upon the requirement that the shortened time period be "reasonable", noting:

> What would be reasonable in one class of cases would be entirely unreasonable in another.
>
> It is necessary, therefore, to look at the nature and circumstances of the case before us, and of the class of cases to which it belongs.

Again in *Wilson* v. *Iseminger,* 185 U.S. 55, 63 (1902), the Court stated that the time allowed cannot be "manifestly so insufficient that the statute becomes a denial of justice". *See also Terry* v. *Anderson,* 95 U.S. 628, 633 (1877) ("the question is one of reasonableness" and "for what is reasonable in a particular case depends upon its particular facts").

The ITC asserts that our decision is controlled by *Bradley* v. *School Board of Richmond,* 416 U.S. 696, 715 (1974), that held "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect". *Bradley* did not involve the retroactive application of a statute of limitations but rather the applicability of a new attorneys fee statute enacted while a case was pending before the Court of Appeals.

The Court was careful to state that its decision in *Bradley* did not "purport[] to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary", and that exceptions " 'had been made to prevent manifest injustice,' citing *Greene* v. *United States,* 376 U.S. 149 (1964)". *Id.* at 715, 716 (footnote omitted). When the statute is silent, the courts may determine the reasonableness of applying new statutes of limitations to the specific circumstances involved. In the case before us the statute is silent as to both existing appeal rights and effective date. In this statutory silence, we are not required to adopt an inflexible interpretation that extinguishes all preexisting opportunities for appeal, whatever the circumstances.

We interpret the silence of Congress as intending that a just transition shall ensue. In implementation of the tradition of enabling judicial review when feasible, we hold that Union's procedure was not unreasonable under the circumstances, and that its appeal is not barred by the statute.

We therefore consider whether Union's appeal is barred by laches. As dicussed *supra,* Union was proceeding with a jury trial before the United States district court. In reliance on the statute then in effect and reinforced by the decision in *SSIH,* Union was subject to no statutory time limit within which to appeal the ITC's 1982 and 1983 determinations. In February 1984 the ITC denied

Union's request for a new investigation, and in June 1984 the jury found in Union's favor on its section 43(a) claim; Han Baek was enjoined and held in contempt. When the 60-day limit was enacted on November 11, 1984, and on the date 60 days thereafter that the ITC says was Union's last chance to appeal, the Second Circuit had not decided the appeal from the jury verdict.

The Second Circuit recognized the possibility that this court would accept Union's appeal as timely. The ITC has not argued that it was prejudiced by Union's delay in filing this appeal. *See Leinoff* v. *Louis Milona & Sons, Inc.*, 726 F.2d 734, 741, 220 USPQ 845, 850 (Fed. Cir. 1984). In view of all the circumstances, we conclude that this action is not barred by laches.

II

The ITC agrees that its October 29, 1982 and May 24, 1983 adverse decisions are final determinations. The ITC argues, however, that the February 9, 1984 decision is not a final determination under subsection (d), (e), or (f) of section 1337 and therefore is not appealable pursuant to § 1337(c). The ITC moves dismissal of that portion of the appeal.

We deny this motion, without prejudice to its renewal at argument on the merits. From the limited record before us, it appears that the facts are closely related. We think it premature to bar any requisite review of ancillary material. *Refractarios Monterrey, S.A.* v. *Ferro Corp.*, 606 F.2d 966, 970 n.10, 203 USPQ 568, 572 n.10 (CCPA 1979), *cert. denied*, 445 U.S. 943, 205 USPQ 488 (1980). *See also American Telephone and Telegraph Co.* v. *U.S. Int'l Trade Comm'n*, 626 F.2d 841, 842, 206 USPQ 222, 223 (CCPA 1980) ("court will consider evidentiary matters associated with statutory final determinations"). In *SSIH*, 673 F.2d at 1389–90, 213 USPQ at 530–32, the CCPA held that the denial of a motion to reopen the record to consider new evidence is appealable. To the extent that the denial of a reinvestigation is related to the prior final determination on appeal, it is premature for us to decide whether the interests of justice and of economy of litigation are served if the February 9, 1984 ITC decision is insulated from all scrutiny.

Accordingly, IT IS ORDERED:

(1) Petitioner's motion to dismiss this appeal as untimely is denied.

(2) Petitioner's motion to dismiss that portion of the appeal concerning the February 9, 1984 decision of the ITC is denied without prejudice.

(3) Appellant's brief is due 60 days from the date of its receipt of this Order.

DATED: December 17, 1985.
For the Court:

PAULINE NEWMAN,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 85–129)

VICTOR A. CAVAZOS, A/C CONSTRUCTIONES PROTEXA, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82-11-01600

Before: RE, *Chief Judge.*

Memorandum Opinion and Order

[Defendant's motion to dismiss granted; action dismissed.]

(Decided December 27, 1985)

Stein Shostak Shostak & O'Hara (Marjorie M. Shostak), for the plaintiff.
Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Veronica A. Perry*), for the defendant.

RE, *Chief Judge*: In this action, the plaintiff, Victor A. Cavazos, challenges the refusal of the Customs Service to reliquidate certain tractors and parts entered at the port of Laredo, Texas. The Customs Service classified the merchandise as "[t]ractors * * * whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors: other," under item 692.3522, TSUS. Plaintiff contests this classification, and contends that the merchandise is entitled to be entered duty-free under item 800.0035, TSUS, as "[p]roducts of the United States when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad."

Pursuant to Rule 12(b)(5) of the Rules of this Court, the defendant has moved to dismiss the action for failure to state a claim upon which relief may be granted. Plaintiff opposes the motion, and asks that the matter be heard on the merits.

Since plaintiff has failed to state a claim upon which relief may be granted, the action is dismissed.

On August 8, 1980, plaintiff, the importer of record, received at the port of Laredo, Texas, a shipment of merchandise, which was described on the customs invoices as "tractors and parts thereof."

On the consumption entry form, plaintiff sought duty-free treatment of the tractors and parts under item 800.0035 as "American goods returned." The Customs Service did not grant duty-free treatment, and classified the merchandise under item 692.3522, TSUS, as tractors and parts thereof, and liquidated the entry on December 29, 1980.

On February 17, 1981, plaintiff timely filed a protest of the classification. The protest was denied by the Customs Service on March 30, 1981. Thereafter, in a letter received by the District Director of Customs on June 4, 1981, plaintiff requested reliquidation of the merchandise as "American goods returned." In support of this request, plaintiff submitted two manufacturer's affidavits, which declared that the cylinder brackets of the tractors were manufactured in the United States. The District Director returned this letter because plaintiff had not specified under which section of law or regulation the relief was being requested. Plaintiff resubmitted the affidavits on June 26, 1981, and requested reliquidation "under 520(c) of the Customs Regulations." On April 6, 1982, Customs denied plaintiff's request, and plaintiff thereafter filed this action.

The plaintiff contends that Customs made a mistake of fact that is correctable under section 520(c)(1) of the Tariff Act of 1930, 19 U.S.C. § 1520(c)(1) (1982).

Section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514 (1982 & West Supp. 1985), sets forth the proper procedure for an importer to protest the classification when the importer believes that the Customs Service has misinterpreted the applicable law, and has improperly classified the imported merchandise. In addition, Customs may reliquidate an entry to correct a mistake of fact, clerical error, or other inadvertence which has caused an error in liquidation. Tariff Act of 1930 § 520(c), 19 U.S.C. § 1520(c). Section 520(c) provides, in part:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, * * * reliquidate an entry to correct—
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction.

19 U.S.C. § 1520(c)(1) (1982).

For the purposes of section 520(c), a mistake of fact has been defined as "a mistake which takes place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist." *C.J. Tower & Sons* v. *United States,* 68 Cust.

Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972) *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

In this case, plaintiff alleges that "duty was assessed on the merchandise * * * because of a mistake of fact, i.e., the Customs officials believed that the merchandise did not consist of products of the United States returned after having been exported, without having been advanced in value or improved in condition." Plaintiff's conception of mistake of fact, however, is without basis in law, and cannot support this action.

It is well established that a determination by the Customs Service that merchandise is covered by a certain provision of the TSUS is a conclusion of law. *See, e.g., Mattel, Inc.* v. *United States,* 72 Cust. Ct. 257, 262, C.D. 4547, 377 F. Supp. 955, 960 (1974); *Fibrous Glass Products* v. *United States,* 63 Cust. Ct. 62, 65, C.D. 3874 (1969), *appeal dismissed,* 57 CCPA 141 (1970). Therefore, an erroneous classification of imported merchandise is not remediable as a mistake of fact under section 520(c). *Mattel, Inc., supra,* 72 Cust. Ct. at 262, 377 F. Supp. at 960. The courts have consistently held that section 520(c)(1) may only be used to correct mistakes of fact or inadvertence, and may not be used to rectify allegedly incorrect interpretations of law. *Computime, Inc.* v. *United States,* 9 CIT ——, Slip Op. 85–115, at 5 (Nov. 1, 1985); *see also, Hambro Automotive Corp.* v. *United States,* 66 CCPA 113, 120, C.A.D. 1231, 603 F.2d 850, 855 (1979); *PPG Industries, Inc.* v. *United States,* 7 CIT 118, Slip Op. 84–27, at 9 (Mar. 28, 1984). Plaintiff seeks to challenge the classification of the imported merchandise. This, however, is an issue of law not remediable by section 520(c). "Section 520(c)(1) is 'not an alternative to the normal liquidation-protest method of obtaining review,' but rather affords 'limited relief' where an unnoticed or unintentional error has been committed." *Computime, Inc.* v. *United States, supra,* Slip Op. 85–115, at 6 (quoting *C.J. Tower & Sons* v. *United States,* 68 Cust. Ct. 17, 21, C.D. 4327, 336 F. Supp. 1395, 1399 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974)).

In this case, plaintiff has not shown that any mistake of fact was made in the classification of its merchandise. The question presented in this case is clearly a legal question. The question is whether the imported merchandise can properly be classified as American goods returned. This question was raised by plaintiff's original section 514 protest which challenged the classification of the merchandise. *See* 19 U.S.C. § 1514(a)(2) (1982 & West Supp. 1985).

Plaintiff had requested duty-free treatment on the consumption entry form. The record, however, shows that, on the form, it is noted that plaintiff had not supplied the appropriate documents to support his claim. Thus, it is clear that the appropriate customs officer made a legal determination as to the classification of the merchandise on the basis of the facts presented, and in light of plaintiff's claimed classification. Moreover, the record shows that plain-

tiff contested this legal conclusion in plaintiff's original protest, and that the protest was denied by Customs.

Plaintiff, however, has not challenged the denial of his original protest. Instead, plaintiff has sought to utilize section 520(c) to challenge the classification. This is an obvious attempt to use a section 520(c) procedure as a substitute for a challenge to the classification of the merchandise pursuant to section 514(a)(2). On the facts presented, it is clear that plaintiff's allegation of a mistake of fact is, in reality, a challenge to the legal conclusion of the Customs Service.

It is the determination of the Court that plaintiff has not stated a claim upon which relief can be granted under section 520(c). Plaintiff has not pursued the appropriate statutory remedy to challenge the allegedly incorrect classification of the imported merchandise. Accordingly, defendant's motion to dismiss is granted, and the action is dismissed.

ABSTRACTED PROTEST

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
P85/263	DiCarlo, J. December 16, 1985	Grover Piston Ring Co.	84-4-00602	Item 681.39 (680.90) 9.5%, 9%, 8.6%, 8.1%, 7.6%, 7.1% or 6.7%
P85/264	DiCarol, J. December 19, 1985	J.C. Penney Purchasing Corp.	84-5-00622	Merchandise classified as an entirety

D	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
rate	Item No. and rate		
.6%, %, .7%	Item 660.85 4.5%, 4.4%, 4.2%, 4.1%, 4%, 3.8% or 3.7%.	Agreed statement of facts	Milwaukee Nine types of imported parts
an	Item 737.15 13.9% (motor vehicles) Item A685.60 Free of duty pursuant to GSP (transmitters)	Judgment on the pleadings	New York Model motor vehicle and transmitter

Appeals to the U.S. Court of Appeals for the Federal Circuit

Mast Industries, Inc. *v.* United States, No. 85-9-01243 (CIT Oct. 31, 1985), *appeal docketed,* No. 86-676 (Fed. Cir. Nov. 21, 1985).

Jeannette Sheet Glass Corp. *v.* United States, No. 83-5-00729 (CIT Sept. 11, 1985), *appeal docketed,* No. 86-700 (Fed. Cir. Nov. 29, 1985).

Todd Shipyards Corp. *v.* United States, 9 CIT —, Slip Op. 85-97 (Sept. 20, 1985), *appeal docketed,* No. 86-692 (Fed. Cir. Nov. 26, 1985).

Cabot Corp. *v.* United States, 9 CIT —, Slip Op. 85-102 (Oct. 4, 1985), *appeal docketed,* No. 86-729 (Fed. Cir. Dec. 9, 1985).

Sunburst Farms, Inc. *v.* United States, 9 CIT —, Slip Op. 85-107 (Oct. 10, 1985), *appeal docketed,* No. 86-749 (Fed. Cir. Dec. 16, 1985).

Pagoda Trading Co. *v.* United States, 9 CIT —, Slip Op. 85-87 (Aug. 27, 1985), *appeal docketed,* No. 86-750 (Fed. Cir. Dec. 18, 1985).

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